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May 19, 1997

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

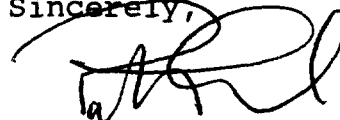
Re: Reply Comments in Response to  
Metro Broadcasters-Texas, Inc.'s  
Comments and Counterproposal concerning  
Amendment of Section 73.202(b),  
FM Table of Allotments  
MM Docket No. 97-91; RM-8854  
(Lewisville, Gainesville, Robinson, Corsicana,  
Jacksboro, and Mineral Wells, Texas)

Dear Mr. Caton:

Transmitted herewith on behalf of K95.5, Inc. is an original and four copies of its Reply Comments to Metro Broadcasters-Texas, Inc.'s Comments and Counterproposal concerning the above-referenced allotment proceeding.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,



John F. Garziglia  
Patricia M. Chuh

Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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MAY 19 1997  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

)  
Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations )  
(Lewisville, Gainesville, )  
Robinson, Corsicana, Jacksboro, )  
and Mineral Wells, Texas) )

MM Docket No. 97-91  
RM-8854

To: Chief, Allocations Branch

REPLY COMMENTS

K95.5, Inc., by its attorneys, hereby respectfully submits its reply comments in response to Metro Broadcasters-Texas, Inc.'s ("Metro") Comments and Counterproposal, filed on May 5, 1997 in the above-referenced allotment proceeding.<sup>1/</sup>

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<sup>1/</sup> The Commission instituted the above-referenced allotment proceeding as a result of a petition for rule making filed by Heftel Broadcasting Corporation ("Heftel"), permittee of KECS(FM), Channel 300C2, Gainesville, Texas and licensee of KICI(FM), Channel 300C1, Corsicana, Texas, proposing two interrelated reallotments. First, Heftel proposes (1) substitution of Channel 300C1 for Channel 300C2 at Gainesville, Texas, (2) reallotment of Channel 300C1 to Lewisville, Texas, and (3) modification of its construction permit for KECS(FM) to specify operation on Channel 300C1 at Lewisville, Texas. Second, Heftel proposes (1) the substitution of Channel 300A for Channel 300C1 at Corsicana, Texas, (2) reallotment of Channel 300A to Robinson, Texas, and (3) modification of its license for KICI(FM) to specify operation on Channel 300A at Robinson, Texas. The substitution of Channel 300A for Robinson is necessary in order to accommodate the substitution of Channel 300C1 to Lewisville, Texas. Heftel also proposes to substitute Channel 237A for Channel 299A at Jacksboro, Texas and Channel 240C3 for Channel 240C1 at Mineral Wells, Texas in order to accommodate these reallotments. On March 14, 1997, the Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on the proposed amendments of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. The NPRM set May 5, 1997 as the deadline for interested parties to file comments (and counterproposals) and May 20, 1997 as the deadline to file reply comments. Therefore, the instant reply comments are timely filed by K95.5, Inc.

Pursuant to the NPRM in the above-referenced allotment proceeding, Metro, licensee of KHYI(FM), Howe, Texas filed its "Comments and Counterproposal" on May 5, 1997. Metro proposes to (1) allot Channel 238C2, 238C3, or 238A to Detroit, Texas, (2) modify the license of KHYI to specify operation on Channel 237C2 instead of Channel 237C3, (3) substitute Channel 294C2 for Channel 238C2 at Hugo, Oklahoma, and (4) maintain the current allotment of 299A at Jacksboro, Texas, in the above-referenced allotment proceeding. Metro Comments and Counterproposal at 1.

Although Metro labeled its pleading "Comments and Counterproposal," the Commission should not consider it as a counterproposal in the above-referenced allotment proceeding because it is not a "counterproposal," as defined by the Commission. "A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931, note 5 (1990). See also Clark, Colorado, 11 FCC Rcd 6371, note 2 (1996); Flemingsburg, Kentucky, 11 FCC Rcd 6374, para. 4 (1996); Rocky Mount, North Carolina, 6 FCC Rcd 2153, para. 10 (1991)(pleading not counterproposal where proposed no conflicting channel allotment).

In this case, Metro only opposes the substitution of Channel 237A for existing Channel 299A at Jacksboro, Texas because such a substitution would conflict with its previously filed defective

proposal<sup>2/</sup> in MM Docket No. 97-26, RM-8968 ("Detroit Allotment Proceeding"). The Comments and Counterproposal filed by Metro in the above-referenced allotment proceeding do not propose any conflicting channel allotments in the context of this allotment proceeding.<sup>3/</sup>

In its Comments and Counterproposal filed in the above-referenced allotment proceeding, Metro only repeats the assertions that it previously espoused in the Detroit Allotment Proceeding. Other than to state that the proposed allotments in the above-referenced allotment proceeding are "incompatible" with the proposal set forth in the NPRM, Metro does not explain why its purported counterproposal conflicts with the proposed allotments in the context of the allotment proceeding at hand. There is a simple explanation for Metro's failure. A conflict will only exist if existing Channel 237A is substituted for Channel 299A at Jacksboro, Texas. However, the conflict is not within the context of the allotment proceeding at hand, but between the NPRM in this allotment proceeding and Metro's previously filed defective counterproposal in the Detroit Allotment Proceeding! Metro's

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<sup>2/</sup> The defective nature of the Comments and Counterproposal filed by Metro in the Detroit Allotment Proceeding ("Detroit Counterproposal") is fully explained in the Opposition to Metro's Motion for Leave to File Supplemental Comments filed by K95.5, Inc. on May 15, 1997 in the Detroit Allotment Proceeding (attached hereto as Exhibit No. 1). See also infra discussion at page 5.

<sup>3/</sup> Metro's Comments and Counterproposal would be a proper counterproposal in the instant allotment proceeding if it did not conflict with the previously and timely filed proposals in the Detroit Allotment Proceeding. In the Detroit Allotment Proceeding, Metro seeks an upgrade for its station KHTI(FM), Howe, Texas from its present Channel of 237C3 to Channel 237C2. Such an upgrade would swallow up Channel 237A.

Comments and Counterproposal comment on the proposed substitution of channels at Jacksboro, Texas, but do not propose an alternative and mutually exclusive allotment in the context of the above-referenced allotment proceeding.<sup>4/</sup>

Metro proposes to maintain existing Channel 299A at Jacksboro, Texas (in opposition to Heftel's proposal to substitute Channel 237A for Channel 299A) under false pretenses in this allotment proceeding. Metro's proposal is not "an alternative and mutually exclusive allotment" in the above-referenced allotment proceeding. Rather, it is, at best, a late-filed counterproposal to the Detroit Proceeding.<sup>5/</sup> By filing its Comments and Counterproposal in the above-referenced allotment proceeding, Metro is attempting to file a late non-defective counterproposal in the Detroit Allotment Proceeding. Metro is trying to cure its fatally defective Detroit Counterproposal.<sup>6/</sup>

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<sup>4/</sup> Further, Metro completely fails to take into account K95.5, Inc.'s properly filed counterproposal in the Detroit Allotment Proceeding. In its counterproposal in the Detroit Allotment Proceeding, K95.5, Inc. proposes to allot Channel 294C2 to Antlers, Oklahoma as that community's first local aural transmission service. See March 17, 1997 Counterproposal filed by K95.5, Inc. in MM Docket No. 97-26; RM-8968 (on file with the Commission). However, in its Comments and Counterproposal filed in the above-referenced allotment proceeding, Metro does not address or mention K95.5, Inc.'s proposal in the Detroit Allotment Proceeding whatsoever.

<sup>5/</sup> See infra note 6.

<sup>6/</sup> For instance, Metro's purported counterproposal in this proceeding asks that the facilities of KITX(FM), Hugo, Oklahoma be modified to operate on Channel 294C2. This cannot be done since to do so would conflict with the timely filed counterproposal in the Detroit proceeding to allot Channel 294C2 to Antlers, Oklahoma. Thus, Metro's counterproposal for Channel 294C2 cannot be accepted in this proceeding without eviscerating the procedures and cut-off protection given in Appendix, MM Docket No. 97-26, para. 3 and Section 1.420(d) of the

Metro's Detroit Counterproposal is fatally defective because interested parties filing counterproposals that require an existing station to change channels must state their intention to reimburse the affected parties. See e.g., Punxsutawney, Pennsylvania, 3 FCC Rcd 5555 at para. 9; Naples, Florida, 10 FCC Rcd 6548 at para. 9 ("reimbursement pledge is a fundamental component of any counterproposal and must be present....") (emphasis added). Metro did not state in the Detroit Proceeding its intention to reimburse K95.5, Inc. for the reasonable and prudent costs involved in changing its frequency from 238C2 to 294C2, as proposed in its Detroit Counterproposal. As such, the Commission should dismiss Metro's Detroit Counterproposal because it does not contain a reimbursement statement. See e.g., Fort Bragg, California, 6 FCC Rcd 5817, note 2 (technically and procedurally deficient counterproposal rejected); Naples, Florida, 10 FCC Rcd 6548, para. 9 (counterproposal dismissed for failure to make a reimbursement commitment in the counterproposal).

Thus, the Commission should not allow Metro to cure its fatally defective Detroit Counterproposal by considering the Comments and Counterproposal submitted by Metro as a counterproposal in the above-referenced allotment proceeding. Further, the Commission should demand that Metro stop wasting the Commission's valuable resources by filing defective and misleading "counterproposals." If Metro is so intent on obtaining an upgrade for its station KHYI(FM), Howe, Texas, Metro should be

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Commission's Rules, which set a strict deadline on the filing of proposals that conflict with proposals advanced in the Detroit proceeding.

required to file a new technically and procedurally correct proposal in compliance with the Commission's rules and regulations. Therefore, the Commission should not treat the Comments and Counterproposal filed by Metro as a counterproposal in the above-referenced allotment proceeding.

Respectfully submitted,

K95.5, INC.

By: 

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Patricia M. Chuh  
Its Attorneys

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May 19, 1997

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May 15, 1997

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**MAY 15 1997**

Federal Communications Commission  
Office of Secretary

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

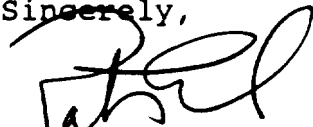
**Re: Opposition to Metro Broadcasters-Texas, Inc.'s  
Motion for Leave to File Supplemental Comments  
concerning Amendment of Section 73.202(b),  
FM Table of Allotments  
MM Docket No. 97-26; RM-8968  
(Detroit, Texas)**

Dear Mr. Caton:

Transmitted herewith on behalf of K95.5, Inc. is an original and four copies of its opposition to Metro Broadcasters-Texas, Inc.'s Motion for Leave to File Supplemental Comments concerning the above-referenced allotment proceeding.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,



John F. Garziglia  
Patricia M. Chuh

Enclosure

bcc: Mr. William H. Payne

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 97-26
Table of Allotments,	)	RM-8968
FM Broadcast Stations.	)	
(Detroit, Texas)	)	

To: Chief, Allocations Branch

**OPPOSITION TO MOTION FOR LEAVE TO**  
**FILE SUPPLEMENTAL COMMENTS**

K95.5, Inc., by its attorneys, hereby submits its opposition to Metro Broadcasters-Texas, Inc.'s ("Metro") Motion for Leave to File Supplemental Comments in the above-referenced proceeding ("Motion").<sup>1/</sup>

The NPRM in the above-referenced allotment proceeding established March 17, 1997 as the deadline for interested parties to file comments and April 1, 1997 as the deadline for filing reply comments. Metro, licensee of KHYI(FM), Howe, Texas filed its comments and counterproposal on March 17, 1997.<sup>2/</sup> In its

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<sup>1/</sup> The Commission instituted the above-referenced proceeding as a result of a petition for rule making filed by Great Plains Radiocasting requesting the allotment of Channel 294C2 to Detroit, Texas to provide that community with its first local aural transmission service. On January 24, 1997, the Commission released a Notice of Proposed Rule Making ("NPRM") seeking comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. Pursuant to the NPRM, on March 17, 1997, K95.5, Inc. ("K95.5") timely filed its counterproposal alternatively seeking the allotment of Channel 294C2 to Antlers, Oklahoma as that community's first local aural transmission service.

<sup>2/</sup> On April 1, 1997, Metro filed its reply comments in response to the Counterproposal filed by K95.5 on March 17, 1997.

counterproposal, Metro proposed to (1) allot Channel 238C2, 238C3, or 238A to Detroit, Texas, (2) substitute Channel 294C2 for Channel 238C2 at Hugo, Oklahoma, and (3) modify the license of KHYI to specify operation on Channel 237C2 instead of Channel 237C3. However, Metro's counterproposal did not contain a reimbursement statement concerning the substitution of Channel 294C2 for 238C2 at Hugo, Oklahoma. K95.5, Inc. currently operates FM station KITX on Channel 238C2 at Hugo, Oklahoma. On May 2, 1997, one month after the deadline set out by the NPRM for filing comments (and counterproposals), Metro filed its Motion for Leave to File Supplemental Comments and its Supplement Comments in the above-referenced allotment proceeding. Because Metro's counterproposal is fatally deficient and counterproponents are not allowed to cure defective counterproposals, the Commission should deny Metro's Motion for Leave to File Supplemental Comments and dismiss Metro's counterproposal.

It has been long settled that the Commission mandates "counterproposals to be technically and procedurally correct at the time they are filed (emphasis added)." See e.g., Warsaw, Missouri, 11 FCC Rcd 6372, para. 5 (1996); Naples, Florida, 10 FCC Rcd 6548, para. 9 (1995); Fort Bragg, California, 6 FCC Rcd 5817, note 2 (1991). In addition the Commission requires that where, as here, the allotment proposed in the counterproposal requires an existing station to modify its operation by specifying a new channel, the affected licensee/permittee must be reimbursed. See e.g., Circleville, Ohio, 8 FCC 2d 159 (1967); Punxsutawney, Pennsylvania, 3 FCC Rcd 5555, para. 9 (1988).

Interested parties filing counterproposals that require an existing station to change channels, therefore, must state their intention to reimburse the affected parties. See e.g., Punxsutawney, Pennsylvania, 3 FCC Rcd 5555 at para. 9; Naples, Florida, 10 FCC Rcd 6548 at para. 9 ("reimbursement pledge is a fundamental component of any counterproposal and must be present....") (emphasis added). However, Metro did not state its intention to reimburse K95.5, Inc. for the reasonable and prudent costs involved in changing its frequency from 238C2 to 294C2. If the counterproposal does not contain a reimbursement statement, the counterproposal is deficient and must be dismissed. See e.g., Fort Bragg, California, 6 FCC Rcd 5817 at note 2 (technically and procedurally deficient counterproposal not placed on public notice and rejected); Naples, Florida, 10 FCC Rcd 6548 at para. 9 (counterproposal dismissed for failure to make a reimbursement commitment in the counterproposal). Similarly, Metro's failure to include such a reimbursement statement makes Metro's counterproposal fatally deficient and the Commission should deny Metro's Motion for Leave to File Supplemental Comments and dismiss Metro's counterproposal.

Further, in the instant case, Metro seeks to amend its counterproposal one month after the comment (and counterproposal) deadline established by the NPRM. Although Metro now portends to "clarify that it will reimburse the licensee of Station KITX(FM), Hugo, Oklahoma for its reasonable and prudent costs associated with implementing the requested frequency change," Metro is actually seeking to cure its fatally deficient counterproposal.

Motion at 1. However, Commission precedent does not allow curative amendments to be filed in allotment proceedings, particularly when another counterproponent who timely filed its counterproposal would be prejudiced. See e.g., Amor Family Broadcasting Group v. FCC, 918 F.2d 960 (D.C. Cir. 1990); Charlotte Amalie, Virgin Islands, 12 FCC Rcd 2406, note 3 (1997). Here, K95.5, Inc. timely filed its counterproposal to allot Channel 294C2 to Antlers, Oklahoma. Metro's counterproposal did not contain the requisite reimbursement statement. To allow Metro now to cure its deficient counterproposal would prejudice a counterproponent who timely filed its counterproposal. K95.5, Inc. would be greatly prejudiced by having to modify its existing operation of FM station KITX on Channel 238C2 at Hugo, Oklahoma as a result of a fatally defective counterproposal. This should not be countenanced. Therefore, the Commission should deny Metro's Motion for Leave to File Supplemental Comments and dismiss Metro's counterproposal for lack of the requisite reimbursement statement.

Respectfully submitted,

K95.5, INC.

By: 

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Patricia M. Chuh  
Its Attorneys

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May 15, 1997

CERTIFICATE OF SERVICE

I, Lisa A. Skoritoski, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 15th day of May, 1997, copies of the foregoing Opposition to Motion for Leave to File Supplemental Comments were mailed, postage prepaid, to the following:

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Lisa A. Skoritoski

\* Via Hand Delivery

CERTIFICATE OF SERVICE

I, Lisa A. Skoritoski, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that on this 19th day of May, 1997, copies of the foregoing Reply Comments were mailed, postage prepaid, to the following:

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